

# Chapter 7

## Summary of Findings and Recommendations

# Summary of Findings

## **I. The Conduct of the Investigation into the Death of Gail Miller**

### **(a) General Findings Regarding 1969 Police Investigation into the Death of Gail Miller**

1. The Saskatoon Police and the RCMP conducted a thorough and appropriate investigation of the Gail Miller murder.
2. The crime scene was appropriately preserved, examined, and recorded.

### **(b) Police Interaction with Key Witnesses**

#### **(i) Albert Cadrain**

3. The evidence of Albert Cadrain was not improperly obtained by the police. Cadrain came to the Saskatoon Police voluntarily on March 2, 1969 and provided incriminating evidence against David Milgaard. No police pressure was exerted upon Cadrain to implicate Milgaard. The allegation that the police mistreated Cadrain and coerced incriminating evidence from him is unsupported by the facts and without merit.

4. Albert Cadrain was rational and showed no overt indications of being mentally ill at the time he gave his statement of March 2, 1969 and when he testified at trial. His mental illness, first diagnosed in 1973, was not apparent to investigators or prosecutors prior to David Milgaard's conviction (even if it existed before then). The police were justified in relying upon Cadrain and his evidence was handled appropriately throughout.

**(ii) Initial Statements of Nichol John and Ron Wilson**

5. The initial police statements of Ron Wilson and Nichol John did not include complete details of their activities on the morning of January 31, 1969. Continued questioning of these witnesses by the police was justified.
6. The decision to have Inspector Art Roberts of the Calgary Police Service conduct a polygraph test on Ron Wilson and Nichol John was reasonable. The summary prepared by Detective Sergeant Raymond Mackie was intended as an investigative aid and not as a blueprint for a case police were constructing against David Milgaard. The allegation that the Mackie Summary was prepared as a script for the police to follow in obtaining evidence from John and Wilson is without foundation.
7. After their initial police statements and prior to being interviewed by Art Roberts, Ron Wilson and Nichol John provided the police with further details of their activities on January 31, 1969. In particular, they told the police they stopped a woman for directions, that shortly thereafter their vehicle became stuck in the vicinity of the murder and that David Milgaard and Wilson left the vehicle in separate directions looking for help. Their accounts were generally consistent with what Milgaard had told his trial counsel, except with respect to the length of time Milgaard was away from their stuck vehicle. Wilson said it was 15 minutes, Milgaard said it was a short time and John said she was unable to recall.

**(iii) Ron Wilson**

8. In his May 23, 1969 interview with Art Roberts, Ron Wilson did not initially implicate David Milgaard in Gail Miller's murder. Roberts conducted a polygraph examination testing the veracity of Wilson's evidence, and then advised Wilson that the polygraph showed he was not being truthful in answering certain questions relating to Milgaard's involvement in Miller's murder. Wilson responded by changing his evidence to directly implicate Milgaard. He provided new information, which included an alleged confession by Milgaard, an identification of the murder weapon and an observation of blood on Milgaard's clothing. Roberts did not test the truthfulness of Wilson's new inculpatory evidence by polygraph.
9. Ron Wilson was turned over to the Saskatoon Police to whom he provided two written statements verifying the new information he disclosed to Art Roberts after the polygraph session.
10. The inculpatory evidence Ron Wilson provided to Art Roberts and the Saskatoon Police after the polygraph test is now known to have been unreliable.
11. The Commission lacks evidence to conclude that Art Roberts resorted to outright coercion during his interview with Ron Wilson, but whatever he said to him did not produce the truth. In the course of the polygraph examination and interview, Roberts somehow caused Wilson to tell him what Roberts thought to be the truth.

12. There was a critical failure to record the circumstances of Art Roberts' interview and polygraph of Ron Wilson including the questions asked and the polygraph results. Roberts did not provide a report of the interview and polygraph session.
13. Detective Eddie Karst was a highly experienced, honest and skilled investigator. He did not improperly induce Ron Wilson to make the statements that he gave on May 23 and 24, 1969.
14. The Saskatoon Police honestly and reasonably believed that Ron Wilson's inculpatory evidence provided to Art Roberts had been verified by the polygraph as being truthful, when it had not. In the circumstances, it was reasonable for the Saskatoon Police to rely on Wilson's evidence.

**(iv) Nichol John**

15. After the polygraph session with Ron Wilson, Art Roberts interviewed Nichol John. She initially denied that David Milgaard was involved in Gail Miller's murder, but after continued questioning by Roberts she told him that she just remembered witnessing Milgaard commit the murder. John was turned over to the Saskatoon Police and the next day gave a written statement to Raymond Mackie confirming the evidence she reported to Roberts.
16. The Commission lacks evidence to conclude that Art Roberts resorted to outright coercion during his interview with Nichol John, but whatever he said to her did not produce the truth. Roberts somehow pressured John into telling him what he thought to be the truth. There is a clear distinction to be made between coercing evidence from a witness in the sense of compelling assent or belief and using persuasive techniques such as repetitive questioning and suggestion.
17. There was a critical failure to record the circumstances surrounding Art Roberts' interview of Nichol John and the taking of John's statement by Raymond Mackie on May 24, 1969. Neither Roberts nor Mackie left a report as to the circumstances surrounding John's statement which must now be seen as the result of pressure by Roberts.
18. There is no evidence before the Commission to suggest that Nichol John was mistreated by the Saskatoon Police while staying in the cells on May 23, 1969 or that she was "hysterical". The origin of this story appears to be the 1981 interview of John where Joyce Milgaard told John her impression of what happened.

**(v) David Milgaard**

19. David Milgaard was cooperative with the police and provided blood, hair and saliva samples when requested of him.
20. David Milgaard was interviewed and questioned by the police in an appropriate manner. While Milgaard was cooperative, the police found some of his answers to be evasive. Milgaard could not initially give an accurate account of his whereabouts or his activities on the morning of January 31, 1969.

21. David Milgaard denied any involvement in the Gail Miller murder. However, the information he provided to the police confirmed that on the morning of January 31, 1969 he was in the general vicinity of the murder around the time it took place. He was looking for the Albert Cadrain residence located approximately one block from where Gail Miller's body was found, had stopped a woman to ask for directions and had been traveling in back lanes and became stuck in an alley.
22. Information provided to the police by one of David Milgaard's girlfriends in March, 1969 gave the police reason to believe that Milgaard was a person capable of a violent crime, even though his record revealed no such convictions.
23. In light of what the police knew in May, 1969, it was reasonable for them to focus on David Milgaard as a suspect for the murder and to continue to question Albert Cadrain, Ron Wilson and Nichol John.

**(vi) Motel Room Incident Witnesses**

24. In a motel room in May, 1969, David Milgaard pretended to stab a pillow uttering words to the effect that he stabbed, raped and killed Gail Miller. Each of his friends who were in the motel room have slightly different recollections of the precise words used; however, they all confirm that Milgaard stated that he stabbed and killed Miller. Milgaard admitted to his trial counsel, Calvin Tallis, that he was in the motel room with these people but was so stoned that he could not remember what he said and did, explaining that if he said and did what was attributed to him, it would have been a joke.
25. The police properly investigated and dealt with the motel room witnesses and were correct in bringing the motel re-enactment evidence to the prosecutor's attention.

**(c) Autopsy and Forensic Investigation**

26. Staff Sergeant Bruce Paynter's testing of the frozen substance found in the snow near Gail Miller's body was proper and he accurately confirmed it to be human semen. His search of the garments for semen stains met the expected standard of the day, given the tools available to him.
27. Vaginal aspirate from the victim was collected at the autopsy, found to contain semen and discarded. The victim's clothing was removed and left temporarily on the floor of the autopsy room exposing it to contamination. Both actions represented lapses in acceptable procedure, although they did not contribute to the wrongful conviction.

**(d) Investigation of Sexual Assaults and Larry Fisher**

28. During the course of the Gail Miller murder investigation through to the time of David Milgaard's conviction, Larry Fisher was not known to the Saskatoon Police. He was not a suspect in Miller's murder nor in the three attacks on Saskatoon women he committed in the months preceding Miller's murder.
29. Larry Fisher was interviewed by Saskatoon Police at the bus stop at Avenue O and 20th Street on February 3, 1969. He was interviewed as a potential witness and not as a suspect. Nothing in the police interview of Fisher gave reason for suspicion. Fisher escaped detection because he appeared to be just another passenger on a bus that Gail Miller used.

30. The three sexual assaults committed in Saskatoon in the fall of 1968 were diligently investigated by the Saskatoon Police and they later considered the possibility that the perpetrator of these assaults was also the killer of Gail Miller. David Milgaard became a suspect for the murder on March 2, 1969, but not for the sexual assaults, so police interest in a connection between the crimes gradually diminished.
31. The police did not overlook or ignore any evidence then available to them which would have linked the 1968 sexual assaults or Larry Fisher to the Gail Miller murder.
32. The police dealt appropriately with the complaint of a woman who was indecently assaulted on January 31, 1969 at 7:07 a.m., approximately seven blocks from the murder scene. The complaint was investigated for a possible connection to the Gail Miller murder. Due to the time of the assault, the distance from the Miller murder scene and the difference in the severity of the attacks, the police reasonably concluded that the complaint was unconnected to the Miller murder.

**(e) Allegations of Police Misconduct**

33. The issue of police misconduct was squarely before this Commission of Inquiry and there is no evidence that any police officer or police force was guilty of misconduct during the investigation of Gail Miller's death.
34. There is no evidence that David Milgaard was framed by the Saskatoon Police or any police officer. Based on the evidence gathered by the police, investigating officers held an honest and reasonable belief that Milgaard was responsible for the crime.
35. The police investigated more than 200 individuals as potential suspects in connection with Gail Miller's death. After David Milgaard became a suspect on March 2, 1969, the police continued to investigate other people, including at least 38 individuals of interest.
36. The police did not suffer from tunnel vision, which I take to mean focusing on David Milgaard as a suspect to the exclusion of all others. Rather, the Inquiry evidence showed that the police followed every lead they could identify, including the theory that one perpetrator could have been responsible for the 1968 sexual assaults and the Gail Miller murder.
37. The bone handled hunting knife found near the murder scene a number of weeks after the murder was irrelevant and unconnected to Gail Miller's murder. The knife was provided by the Saskatoon Police to the prosecutor and disclosed to David Milgaard's defence counsel. The allegation of misconduct with respect to the alleged disappearance of the knife is without merit.

**II. Conduct of the Criminal Proceedings**

**(a) Prosecutor T.D.R. Caldwell**

**(i) General**

38. T.D.R. Caldwell acted in good faith throughout the prosecution of David Milgaard.
39. T.D.R. Caldwell's conduct did not contribute to the wrongful conviction of David Milgaard. Caldwell offered evidence which he believed to be credible and relevant and did so in a spirit of cooperation with defence counsel.

40. T.D.R. Caldwell provided full cooperation to Calvin Tallis at trial.

**(ii) Motel Room Incident**

41. The accusation that T.D.R. Caldwell paid Craig Melnyk and George Lapchuk for their testimony at the David Milgaard trial in 1970 is false.

42. T.D.R. Caldwell did not promise Craig Melnyk and George Lapchuk favors for their testimony.

**(iii) Disclosure**

43. At the time of David Milgaard's trial, T.D.R. Caldwell and Calvin Tallis were not aware of the 1968 sexual assaults nor of any possible connection to Gail Miller's murder. The Saskatoon Police did not provide Caldwell with the police files relating to the unsolved 1968 sexual assaults nor did they inform Caldwell that the police considered a possible connection between the sexual assaults and the Miller murder.

44. T.D.R. Caldwell's disclosure to Calvin Tallis met the standards of the day. Due account was taken of the prosecutor's discretion in deciding what evidence tended to show the accused's innocence. Although exercising his discretion in good faith, Caldwell did not disclose some evidence from witnesses who told the police that they had seen nothing unusual in the neighbourhood of the crime scene at relevant times (even though they were in a position to have seen activity), or evidence of the indecent assault which reportedly occurred almost contemporaneously with the murder. This non-disclosure was the product of an honest, if mistaken, belief by Caldwell that the evidence was not useful to the defence.

**(b) Defence Counsel Calvin Tallis**

45. Calvin Tallis' preparation for trial was thorough. He met frequently with the prosecutor before the preliminary inquiry to hear what evidence the Crown had and what it intended to lead at trial. He properly informed his client of progress in the case and offered timely advice. His advocacy at both the preliminary inquiry and the trial was skilled and ethical. His client, David Milgaard, received a sophisticated, dedicated and nuanced defence.

46. Calvin Tallis' conduct did not contribute to the wrongful conviction of David Milgaard.

47. Ron Wilson's exculpatory March 3, 1969 statement to the police was provided by T.D.R. Caldwell to Calvin Tallis on August 15, 1969 prior to commencement of the preliminary inquiry. Caldwell was later publicly accused of not producing it and Tallis was criticized for not referring to it at trial. But, at the preliminary inquiry and trial, Tallis specifically questioned Wilson about his initial police interview and the March 3 statement. For sound tactical reasons, Tallis did not show the statement to Wilson during his testimony, nor did he seek to introduce the document as evidence, fearing that the Crown would ask to have Wilson's later more incriminating statements made exhibits as well.

48. The decision for David Milgaard not to testify at his trial, was that of Milgaard and his parents, taken on the advice of defence counsel Calvin Tallis. It was an informed decision, made on the advice of a seasoned, ethical defence lawyer who had taken all relevant factors into account.

**(c) Conduct of the Trial**

**(i) Role of Prosecutor and Defence Counsel**

49. The trial was conducted competently and fairly by both prosecutor and defence counsel.
50. The allegation that T.D.R. Caldwell and Calvin Tallis colluded to put David Milgaard away and that Tallis gave Milgaard a token defence is completely unfounded.

**(ii) Secretor Evidence**

51. The forensic evidence at trial relating to the semen found near Gail Miller's body was either exculpatory or neutral and thus played no role in the conviction of David Milgaard.

**(iii) Nichol John's Evidence and Application of s. 9(2) of the *Canada Evidence Act***

52. In her May 24, 1969 police statement, Nichol John said that she saw David Milgaard grab a girl in the alley and stab her. At trial John did not repeat this evidence.
53. T.D.R. Caldwell applied to the trial judge under s. 9(2) of the *Canada Evidence Act* to use Nichol John's May 24, 1969 statement to challenge the credibility of her trial evidence. The trial judge failed to follow the proper procedure and allowed Caldwell to read the May 24, 1969 statement to John in the jury's presence. Although John did not subsequently adopt the most incriminating parts of her statement as her trial evidence, the jury became aware that she had previously told police that she witnessed David Milgaard commit the murder.
54. Before allowing the jury to learn of Nichol John's previous statement and its contents, the trial judge should have held a *voir dire*, in the absence of the jury. The purpose of the *voir dire* would have been to enable T.D.R. Caldwell to prove the statement and to provide Calvin Tallis with an opportunity to probe the circumstances surrounding the taking of the statement, to show that due to the manner in which the statement was obtained by the police, introduction of the statement and cross-examination on it would be improper.
55. Calvin Tallis should have been allowed to cross-examine Nichol John in the absence of the jury. He could have aggressively questioned John about her dealings with the police without fear of an adverse answer from John being accepted by the jury. Tallis could also have cross-examined Raymond Mackie and Art Roberts, in the absence of the jury, about the circumstances of Roberts' questioning of John and Mackie's taking of her statement. This may have resulted in a ruling by the trial judge that T.D.R. Caldwell could not use the May 24, 1969 statement to cross-examine John, due to the circumstances in which the statement was obtained. Instead, Tallis was denied these opportunities and the jury heard the most incriminating portions of John's May 24 statement before Tallis even had a chance to question her.
56. During the course of T.D.R. Caldwell's cross-examination of Nichol John on her statement, the trial judge persistently intervened and effectively destroyed the credibility of John's evidence that she could not remember or recall the most incriminating parts of her statement. The trial judge's questioning of John left the impression that John's failure to recall was not genuine. In the result, the jury was likely to conclude that the truth lay in her May 24 statement.



57. When Calvin Tallis finally had a chance to question Nichol John, he had no ability to cross-examine her about the incriminating things she now said she could not remember because she had not adopted them as her evidence. As a result, John's unadopted eyewitness account of the murder went untested and was heard by the jury.
58. The trial judge's instructions to the jury about disregarding the portions of Nichol John's May 24, 1969 statement which she did not adopt on the stand amounted to an effort at damage control, which could not repair the trial judge's destruction of her credibility in front of the jury nor his error in failing to permit cross-examination in the jury's absence on the circumstances of her statement.
59. On appeal, the Saskatchewan Court of Appeal found that the trial judge made a procedural error in failing to hold a *voir dire* regarding the circumstances under which Nichol John's statement was provided. However, the Court concluded that David Milgaard suffered no prejudice as a result of the improper procedure utilized by the trial judge. The Saskatchewan Court of Appeal was wrong in reaching this conclusion. Evidence at the Inquiry established that the defence was prejudiced by this error. Allowing the jury to hear John's statement was a turning point in the trial and instrumental in Milgaard's conviction. Had Calvin Tallis been allowed to cross-examine John, Art Roberts and Raymond Mackie in the absence of the jury, he might have revealed circumstances in John's handling by Saskatoon Police and by Roberts which might have convinced the judge to withhold the out of court statement from the jury. What happened instead was disastrous for the defence.
60. The fact that the jury heard Nichol John's May 24, 1969 statement could have led them to accept it as corroboration of Ron Wilson's trial evidence.
61. The combination of legal error respecting the application of s. 9(2) of the *Canada Evidence Act* and Chief Justice Bence's impatience respecting the evidence given by Nichol John at trial probably contributed to the wrongful conviction of David Milgaard.

### **III. Investigation and Prosecution of Larry Fisher for 1968 and 1970 Rapes and Indecent Assault**

62. In the investigation and prosecution of Larry Fisher for the three rapes and one indecent assault committed in Saskatoon in 1968 and 1970, neither the Saskatoon Police nor Crown officials connected Fisher or his crimes to the Gail Miller murder. There was no cover-up by Saskatoon Police or Crown officials respecting Fisher's guilty pleas and convictions in December 1971 in Regina for the rapes and indecent assault.
63. Eddie Karst, who interviewed Larry Fisher in October, 1970, did not connect Fisher to the Gail Miller murder.
64. There was nothing inappropriate about the procedure employed by Crown officials to accept Larry Fisher's guilty pleas. In particular, the direct indictment procedure, the change of venue to Regina, the timing of the guilty pleas and the agreement to concurrent sentences were all adequately explained to the satisfaction of the Commission. There was no evidence that the authorities conspired to deal with Fisher's charges in a way to avoid publicity with a view to preventing detection by David Milgaard or the public of a connection to the Gail Miller murder.

65. Saskatoon Police files relating to the Fisher sexual assaults were apparently lost or destroyed in the course of movement to new premises, or culled. They were not concealed or destroyed by police or Crown officials, in an effort to hide Larry Fisher's crimes.
66. Serge Kujawa did nothing wrong in his official duties relating to either the Milgaard appeal or the prosecution of Larry Fisher. In particular, he did not connect Fisher to the Gail Miller murder. There was no attempt on his part to delay resolution of the Fisher files or to conceal them from the public.

**IV. Post-Conviction Information Received by Police**

**(a) Linda Fisher Visit to Saskatoon Police in 1980**

67. On August 28, 1980 Linda Fisher reported to Saskatoon Police that she believed her ex-husband, Larry Fisher, was responsible for the Gail Miller murder. The report was received, filed, referred, and possibly evaluated on a cursory basis by the Saskatoon Police but it went no further. It should have.
68. The failure of the Saskatoon Police to follow up on Linda Fisher's report was a decision made in good faith, but it was a mistake.
69. Although the Linda Fisher report to police pre-dated by many years any possible recourse to DNA typing, it might have led to the identification of Larry Fisher as a serious suspect in 1980. Had follow up been done, Fisher's movements on the morning of the murder could have been verified, the similarity of his other rapes considered and fresh evidence made available to David Milgaard on the basis of which he could have launched a realistic application for mercy under the *Criminal Code*.
70. Linda Fisher's 1980 statement to the Saskatoon Police did not receive the attention it deserved. The investigation into the death of Gail Miller should have been reopened in 1980 at least to the extent of questioning Larry Fisher and verifying his movements on January 31, 1969.

**(b) Bruce Lafreniere's Visit to RCMP in the Mid-1980s**

71. Bruce Lafreniere, the individual responsible for providing Hersh Wolch with Larry Fisher's name in 1990, told the Inquiry that he made a visit to the Shellbrook RCMP detachment in the mid-1980s to report his suspicions regarding Larry Fisher's involvement in the Gail Miller murder. The RCMP have no record of a report being made and the officer allegedly involved has no recollection of a visit by Lafreniere.
72. There was no proven failure by the RCMP to take appropriate action with respect to Bruce Lafreniere's possible report to the RCMP in Shellbrook in the mid-1980s about information he had linking Larry Fisher to the Gail Miller murder.

**V. Post-Conviction Information Received by Saskatchewan Justice and Police**

**(a) Information Provided by the Milgaards to the Federal Justice Minister in the s. 690 Proceedings and Subsequently Received by Saskatchewan Justice and Police**

**(i) Ferris Report**

73. The September 13, 1988 report of Dr. James Ferris did not prove David Milgaard's innocence. The report was a reinterpretation of trial evidence which was before the jury and Saskatchewan Justice recognized it as such.
74. Dr. Ferris had not read nor been provided with certain key documents from the trial before providing his opinion to the Milgaards. This set in motion a long, unnecessary and inaccurate media campaign and investigation.
75. Although Dr. Ferris' report received wide publicity and came to the attention of Saskatchewan Justice and the police, it was not information which should have caused them to question the safety of the conviction or to reopen Gail Miller's murder investigation.

**(ii) Motel Room Incident**

76. It is clear that the May 1969 motel room incident happened. Although the incident was perceived differently by those in attendance, Deborah Hall's allegation that the trial evidence of Craig Melnyk and George Lapchuk was fabricated is without merit.
77. Instead of explaining it as a crude joke by a stoned but innocent teenager responding to teasing from his friends, the Milgaards repeatedly and publicly alleged that the motel room incident had not occurred, that witnesses had fabricated evidence and that the Crown and the police had acted improperly in obtaining and presenting the evidence at trial. In the result, witnesses were branded as liars in the media and authorities who dealt with them were unjustly criticized.

**(iii) Police Treatment of Albert Cadrain**

78. Albert Cadrain's June 24, 1990 statement to Paul Henderson was not credible. Cadrain did not recant his trial evidence about seeing blood on David Milgaard's clothes. The allegation that the police mistreated Cadrain and coerced incriminating evidence from him is baseless. Cadrain came to the Saskatoon Police voluntarily and provided incriminating evidence against Milgaard.

**(iv) Ron Wilson Recantation**

79. Paul Henderson introduced his theory of police manipulation, coercion and pressure to Ron Wilson during their June 4, 1990 discussion. The statement taken by Henderson from Wilson on June 4, 1990 lacked credibility. Henderson failed to consider that there might have been reasons other than police misconduct which caused Wilson to lie to the police and at trial.
80. Ron Wilson was not the source of any information coming to the attention of Saskatchewan Justice or the police which should have caused them to reopen the investigation into the death of Gail Miller.

**(v) Dog Urine Allegation**

81. The allegation that the semen found near Gail Miller's body may have been or was in fact dog urine was contrived and false.
82. The dog urine allegation was advanced in the media by the Milgaard group to discredit the police officers who gathered and analyzed the semen and the prosecutor who tendered it as evidence at trial. The dog urine allegation negatively affected the credibility of David Milgaard's reopening efforts.

**(vi) Larry Fisher**

83. Larry Fisher first came to the attention of the Milgaard group in 1983 as a convicted rapist who had lived in the basement of the Albert Cadrain home at the time of Gail Miller's murder. This information was not included in the first s. 690 application filed with the federal Minister on December 28, 1988.
84. Larry Fisher came to the attention of the Milgaard group again in February 1990 when Hersh Wolch received an anonymous tip that Fisher was responsible for the murder of Gail Miller. The information was added to the first s. 690 application and was fully investigated by the RCMP at the direction of Justice Canada but no evidence linking Fisher to the Miller murder was found. It was reasonable for Saskatchewan Justice and the police to rely on the Justice Canada and RCMP investigation of this information.

**(b) Decision of Federal Minister on First s. 690 Application – February 27, 1991**

85. Saskatchewan Justice was not directly involved in David Milgaard's first s. 690 application to the federal Minister and they did not participate in the investigation, the review, or the decision making process. Saskatchewan Justice and police relied upon the federal Minister's decision of February 27, 1991 dismissing Milgaard's application and took no steps to reopen the investigation into Gail Miller's death.
86. Saskatchewan Justice and police were aware of the allegation in David Milgaard's s. 690 application that Larry Fisher was Gail Miller's killer but they also knew that the allegation had been investigated by the RCMP and considered by the federal Minister in dismissing the application. Relying upon that, they did not reopen the investigation. This decision was reasonable given that the RCMP had investigated Fisher and could not find evidence linking him to the Miller murder.

**(c) Information Received by Saskatchewan Justice Through the Media**

87. The Milgaards used the media to seek public support for David Milgaard's case and to pressure authorities to take steps to reopen the investigation. While the media campaign had public appeal, much of the information put forward by the Milgaards and reported in the media was inflammatory, inaccurate and misleading.
88. The publication of incorrect information alleging that T.D.R. Caldwell failed to provide Calvin Tallis with Ron Wilson's initial statement to the police in 1969 was counter-productive and should not have caused authorities to reopen the investigation into the death of Gail Miller.

89. The media campaign played a significant role in David Milgaard's reopening efforts but was counter-productive in convincing the federal Minister, Saskatchewan Justice or the police that Milgaard's position had merit. The manner in which information was communicated through the media and its lack of credibility were factors which influenced the authorities in their decision making.
90. Joyce Milgaard's inherent distrust of those involved in the investigation and prosecution of her son caused her to reach premature and incorrect conclusions about wrongdoing on the part of the police, the Crown, the witnesses and even David Milgaard's trial counsel. Unfounded allegations were made with the result that authorities doubted the credibility of any information she provided.
91. In addition to undermining the credibility of David Milgaard's case for reopening, the media campaign weakened confidence in the administration of justice and unfairly hurt the reputation of many individuals involved in the investigation, trial and review of Milgaard's conviction.

**(d) Information Received by Saskatchewan Justice During the Second s. 690 Application and the Supreme Court Reference Case**

92. When the Reference Case was ordered on November 28, 1991 in response to David Milgaard's second s. 690 application, Saskatchewan Justice became an active participant in the process of Milgaard's conviction review and received all information disclosed in the Supreme Court of Canada proceedings.
93. Police and prosecutorial misconduct in the investigation and prosecution of David Milgaard was an issue squarely before the Supreme Court of Canada on the Reference Case. The Supreme Court of Canada found no wrongdoing or misconduct on the part of the police or the Crown in the investigation and prosecution of Milgaard. This finding was relied upon by Saskatchewan Justice in deciding not to reopen the Miller murder investigation.
94. Before the Supreme Court of Canada, David Milgaard's legal counsel argued that Larry Fisher was responsible for Gail Miller's death. The Supreme Court of Canada heard evidence from both Milgaard and Fisher and concluded that Milgaard had not established his innocence. This finding was relied upon by Saskatchewan Justice in deciding not to reopen the Miller murder investigation.
95. Based on all of the information received during the Reference Case and in light of the Supreme Court of Canada decision, Saskatchewan Justice decided not to reopen the investigation into the death of Gail Miller and to enter a stay of proceedings rather than to hold a new trial against David Milgaard. Both decisions were reasonable in the circumstances.

**VI. Detection and Remedying of David Milgaard's Wrongful Conviction**

96. The criminal justice system failed David Milgaard because his wrongful conviction was not detected and remedied as early as it should have been.

97. The conviction review system in Canada is reactive and places too heavy an onus on the wrongfully convicted. The successful remedying of a wrongful conviction depends upon the wrongfully convicted person being able to identify credible grounds to challenge the safety of the conviction and convince the federal Minister of Justice that the conviction warrants a further review by the Court. In practice, only those grounds advanced by an applicant are investigated.
98. The conviction review system in Canada is premised on the belief that wrongful convictions are rare and that any remedy granted by the federal Minister is extraordinary. Change is needed to reflect the inevitability of wrongful convictions and the responsibility of the criminal justice system to detect and correct its own errors.
99. A wrongfully convicted person should not bear the responsibility of investigating his own conviction in order to identify all grounds needed to support a remedy. It is beyond the means and abilities of most wrongfully convicted persons to do so, because they are usually not in the best position to identify credible grounds in a timely manner.
100. In the case of David Milgaard, the onus of identifying credible grounds in a timely manner was a heavy one that was simply beyond the means and abilities of Milgaard and his supporters. They investigated his conviction for eight years before they filed an application for review with the federal Minister, relying on two grounds that were quickly determined to have no merit.
101. If an independent agency such as the United Kingdom's Criminal Cases Review Commission had been in place to investigate David Milgaard's case, it is likely, with its proactive methods and expertise, that credible grounds would have been identified much earlier than they were, even though Milgaard had not raised them.
102. The federal Minister of Justice should not be the gatekeeper to determine whether an alleged wrongful conviction should be returned to the Court for further review. The involvement of a federal politician in the review of individual cases of alleged wrongful conviction invites public advocacy and accusations of political influence. The office of the federal Minister, identified as it is by the public with prosecutions, and being occupied by a political figure, does not lend itself well to the adjudication of issues which arise in the judicial system and are to be returned there.
103. As long as responsibility for conviction review remains with the federal Minister of Justice, there will be the potential for political pressure and public advocacy to play a role in the decision making process, or, at the very least, for the perception to exist that the decision can be so influenced. The conviction review process must not only be truly independent, it must be seen to be independent.

### **VII. Publication of Michael Breckenridge Allegations**

104. The Michael Breckenridge allegations were completely false. Their publication destroyed the credibility of the Milgaard group and any chance of Saskatchewan Justice agreeing to reopen the investigation into the death of Gail Miller before DNA results were announced in July of 1997.

105. The Michael Breckenridge allegations were damaging to reputations and counter-productive to the Milgaard reopening effort. The investigation of the allegations by the RCMP resulted in a major and unnecessary public expense.

### **VIII. RCMP Investigation**

106. The 1993 RCMP investigation (Project Flicker) in response to the Michael Breckenridge allegations was lengthy, sophisticated, costly and comprehensive. No fewer than 68 allegations of conduct amounting to obstruction of justice were investigated. In the result, the Alberta Justice Report and the RCMP Report concluded that there was no criminal wrongdoing nor any attempt to obstruct justice in the investigation or prosecution of David Milgaard.
107. The ambit of the RCMP inquiry reached beyond the targets of the Michael Breckenridge allegations and amounted to a reinvestigation of the death of Gail Miller.
108. The RCMP Report and the Alberta Justice Report did not provide information which should have caused the police or Saskatchewan Justice to reopen the investigation into the death of Gail Miller.

### **IX. DNA**

109. No DNA based information came to the attention of Saskatchewan Justice or the police prior to 1997 which should have caused them to reopen the investigation into the death of Gail Miller.
110. In hindsight, discarding the vaginal aspirate taken from Gail Miller's body during the autopsy in 1969 was unfortunate. DNA typing was not possible nor even contemplated in 1969. However, the vaginal aspirate might eventually have provided material for DNA typing, especially since the full extent of the semen staining on Miller's clothing went undetected until 1997.
111. Semen stained material from the victim's panties was wasted in Dr. Ferris' laboratory in 1988 and further semen staining on Gail Miller's clothing was missed by RCMP analyst Patricia Alain in 1992. Alain's failure to detect the larger semen stains on the clothing in 1992 was due to inadequate testing facilities in the RCMP laboratory in Ottawa.
112. Full and proper testing of the items by the Forensic Science Services laboratory in England in 1992 could have identified the full extent of the staining, excluded David Milgaard as the donor and implicated Larry Fisher to a limited degree (within limits of one in fifty) using the DQ Alpha method. Scientific advances by 1994 meant that had the Forensic Science Services laboratory in England tested the items then or later using the STR Quad method, results from the panties and the dress would have provided strong evidence that Fisher was the donor.
113. Successful DNA testing might also have been available earlier than 1997 had the parties been able to agree sooner on the testing method to be used. There was no delay attributable to Saskatchewan Justice or police.

## Recommendations

Number	Recommendation
1	Dedicated medical examiner's facilities should be established in one or more major centres where all autopsies deemed necessary in cases of sudden death would be performed by qualified forensic pathologists in the service of the province.
2	There should be mandatory sharing of investigation reports between all police forces assisting in major cases. The reports should be directed to the file manager to become part of the major case management file.
3	Municipal police forces within the province who ask for assistance from the RCMP should ensure that they have in place a written agreement describing the terms, conditions and responsibilities of inter-agency relationships pursuant to the Saskatchewan Police Commission Policy Manual for Saskatchewan Municipal Police Services (2004).
4	Police should ensure that every statement taken from a young person in a major case, whether as a witness or a suspect, is both audio recorded and video recorded.
5	The <i>Criminal Code</i> should be amended to permit academic inquiry into jury deliberations with a view to gathering evidence of the extent to which jurors accept and apply instructions on the admissibility of evidence, particularly relating to inconsistent out of court statements. Amendments to s. 9 of the <i>Canada Evidence Act</i> should then be considered.
6	Every complaint to police calling into question the safety of a conviction should be referred to the Director of Public Prosecutions.
7	For the better administration of justice in this province I recommend that prosecutors desist from unsolicited contact with the National Parole Board. If asked, they should confine recitation of the facts of a case to those found by the courts as expressed in the reasons of a judge sitting alone, or in a jury trial to those cited by the judge in reasons on sentencing. Prosecutors should avoid leaving the impression that they are heavily invested in a case on a personal level.
8	In all homicide cases, all trial exhibits capable of yielding forensic samples should be preserved for a minimum of 10 years. Convicted persons should be given notice after 10 years of the impending destruction of exhibits relating to their trials, allowing applications for extensions.
9	In all indictable offence cases, documentary exhibits should be scanned and stored electronically, unless a court orders otherwise.



Number	Recommendation
10	All prosecution and police files, including police notebooks, relating to indictable offences should be retained in their original form for a year, then scanned and entered into a database where a permanent, secure electronic record can be kept.
11	Victims of crime should be informed of the resolution of their cases.
12	Compensation for wrongful conviction lies within the purview of the Executive and should remain there, but factual innocence, as the sole criterion for paying compensation, is unduly restrictive. Where a miscarriage of justice has resulted from an obvious breach of good faith in the application of standards expected of police, prosecution, or the courts, the door to compensation should not be closed for lack of proof of factual innocence.
13	The investigation of claims of wrongful conviction should be done by a review agency independent of government, established along the model of the English Criminal Cases Review Commission, replacing ministerial review under s. 696.1 of the <i>Criminal Code</i> . The review agency would report directly to the Court of Appeal of the province or territory which registered the conviction.